KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400

3050 K STREET, NW

WASHINGTON, DC 20007

(202) 342-8400

NEW YORK, NY
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICE
MUMBAI, INDIA

FACSIMILE
(202) 342-8451
www.kelleydrye.com

WILLIAM M. GUERRY
DIRECT LINE: (202) 342-8858
EMAIL: wguerry@kelleydrye.com

October 16, 2015

Mr. Daniel Haltiwanger
Richardson Patrick, Westbrook & Brickman LLC
1730 Jackson Street
Barnwell, SC 29812

Re: Notice of Intent to Sue MTD dated August 19, 2015

Dear Mr. Haltiwanger:

MTD Products Inc ("MTD") is in receipt of your enclosed correspondence to the U.S. Environmental Protection Agency regarding the potential Citizen Suit action against MTD and others. MTD is proactively and transparently providing you with all this information so that you and the South Carolina Clean Air Initiative (SCCAI) can make a well-informed decision and elect not to file a judicial complaint against MTD, Lowe's or Briggs & Stratton in general, and my client MTD in particular, for all the reasons set forth in this letter.

I. Overview

In your letter, the only MTD product that you refer to is a Bolens 125cc gas push mower with an engine and evaporative fuel system manufactured and emission-certified with US EPA by Briggs & Stratton.

Briggs & Stratton produces a separate and distinct operators' manual for its engines that are used to power the MTD push mower. Briggs & Stratton includes in its operators' manual—a standard, engine, commercial warranty, and a separate and specific EPA "emissions warranty." This "emissions warranty" includes all the information and provisions that are required by US EPA and the California Air and Resources Board (CARB). In fact, Briggs & Stratton's "emission's warranty" is approved by CARB and EPA in each engine family's certification application on a model year basis.

MTD issues its own distinct and entirely separate general commercial, (non-emissions), product Warranty for the Bolens lawn mower. MTD clearly states in the second paragraph of this

Product Warranty that the consumer is provided with a separate Emissions Warranty packaged in the box with the mower at the time of purchase. As you obviously know, but try to intentionally obfuscate, the MTD standard, commercial warranty has no connection to the EPA emission warranty issued by Briggs & Stratton. Consequently, the separate operator's manual produced by MTD for the mower appropriately does not contain any provisions relating to the EPA certification or emission warranty obligations.

Attached to this correspondence are the following general commercial and emission warranty statements associated with the MTD-Bolens walk behind mower equipped with a 125cc Briggs & Stratton engine.

1. The separate product (non-emission related) warranty issued by MTD
2. The separate engine (non-emission related) warranty issued by Briggs & Stratton
3. The separate emission warranty (for both exhaust and evaporative emissions) issued by Briggs & Stratton as the certifying manufacturer

Additionally, embedded below is a photograph of the Emission Control Information label appearing on a Model Year 2015 125 cc Briggs & Stratton engine like the one used on the Bolens push mower:

II. Invalid Allegations Against MTD

You claim (under the heading "EMISSION WARRANTY VIOLATIONS") in your Notice of Intent letter:

> *Section 207(a) of the Clean Air Act (42 U.S.C. § 7541(a)) requires **certifying** manufacturers to warrant to purchasers that their engines and equipment are designed, built, and equipped to conform at the time of sale to the applicable regulations during the specified warranty period. (Emphasis added)*

In your correspondence, you acknowledge the "certifying manufacturer" is the responsible and liable party under the CAA. While the term "certifying manufacturer" is not defined in the CFR, "certification" is, and at 40 CFR 1054.801 it states: *Certification means relating to the process of obtaining a certificate of conformity for an emission family that complies with the emission standards and requirements in this part.* Simply stated, the entity that has the Certificate of Conformity is the entity that has the CAA responsibilities. In this case, Briggs & Stratton, not MTD or Lowes, applies for and obtains a Certificate of Conformity, is the holder of the Certificate of Conformity, and is clearly the "certifying manufacturer" as the label above demonstrates.

On October 15, 2015—in response to your correspondence, I had phone conversations with several Senior EPA Managers in EPA's Office of Transportation and Air Quality (OTAQ). These EPA experts are the most knowledgeable Agency experts, who for many years have developed and/or overseen the implementation of EPA's Certification and Compliance Requirements for Small Spark-Ignited Engines. In these recent conversations, all the EPA experts confirmed that any general commercial warranty is not subject to any EPA or CAA Regulations or requirements, and that such requirements only apply to the separate EPA "emission warranty." In these recent phone conversations, all these EPA managers consistently also confirmed that in 40 CFR §1068.115 that EPA explicitly clarified which specific entity is responsible (across all of EPA's non-road regulatory programs) for all aspects of EPA compliance, including the EPA emissions warranty requirements. That section cites to section 207 of the Federal Clean Air Act as requiring the "*certifying manufacturer*" to warranty to purchasers that their engines/equipment are compliant and free from defects in materials and workmanship. On my recent calls, these EPA experts explained to me that they chose to use the term "certifying manufacturer" to exclusively mean the manufacturer of the engine that certified the affected engine family—as opposed to a non-integrated, OEM that merely purchases and did not manufacturer or certify the engine or fuel system.

The EPA experts that I recently spoke with also identified other provisions of the 40 CFR which specify that the small engine manufacturer is the responsible "certifying manufacturer" for all engine compliance requirements. For example, 40 CF 1054.20, entitled *"Who is responsible for compliance?"* explicitly states:

> *The requirements of this part are generally addressed to manufacturers subject to this part's requirements. The term "you" generally means the certifying*

> *manufacturer. For provisions related to exhaust emissions, this generally means the engine manufacturer, especially for issues related to certification (including production-line testing, reporting, etc.). For provisions related to certification with respect to evaporative emissions, this generally means the equipment manufacturer. Equipment manufacturers must meet applicable requirements as described in §1054.20.* ***Engine manufacturers that assemble an engine's complete fuel system are considered to be the equipment manufacturer with respect to evaporative emissions (see 40 CFR 1060.5).*** *(Emphasis added)*

Briggs & Stratton also assembles and certifies the engine's fuel system when the engine is manufactured. In this case, Briggs & Stratton is also responsible for all certification issues such as the production-line testing and reporting.

Furthermore, from the exhaust specific regulations, 40 CFR § 1054.120, entitled "What emission-related warranty requirements apply to me?" clarifies this understanding, and reads, in relevant part:

> *The requirements of this section apply to the* ***manufacturer certifying*** *with respect to exhaust emissions. See 40 CFR part 1060 for the warranty requirements related to evaporative emissions.*
>
> *(a) General requirements.* ***You*** *must warrant to the ultimate purchaser…that the new engine, including all parts of its emission control system, meets two conditions…… (Emphasis added)*

Likewise, for the evaporative specific regulations, 40 CFR § 1060.120, entitled "What emission-related warranty requirements apply?" similarly reads, in relevant part:

> *General requirements. The* ***certifying manufacturer*** *must warrant to the ultimate purchaser and each subsequent purchaser that the new nonroad equipment, including its evaporative emission control system, meets two conditions….. (Emphasis added)*

In this case, Briggs & Stratton exclusively provides all the emission(s) warranties for both the exhaust and evaporative requirements. Accordingly, any alleged emission warranty violation can only be attributable to the certifying manufacturer, which is not MTD.

Your statements that "*MTD may argue that its warranty is in addition to the warranty offered by Briggs & Stratton for the mower. Nothing in the CAA regulations allow for a manufacturer such as MTD to pass its CAA responsibilities on to a component part manufacturer…."* are specious and invalid. MTD, as a non-certifying manufacturer, cannot "pass on its CAA responsibilities" as it has none to "pass on." MTD cannot pass on what it is not statutorily endowed with, and thus, cannot be allocated the responsibility of issuing emission warranty statements.

Furthermore, though it is truly a moot issue, classifying Briggs & Stratton as a "component part manufacturer" completely ignores the definitions throughout the CFR. Note that 40 CFR 1054.801 defines "engine manufacturer" –as the manufacturer of the engine. Furthermore, 40 CFR 1060 clearly distinguishes evaporative manufacturers and component part manufacturers (i.e., companies that manufacture parts such as fuel hoses, lines, and tanks).

I trust once you have had the opportunity to thoroughly review the CAA, as well as the relevant regulations per the CFR (namely, 40 CFR sections 1054, 1060, and 1068) you will agree that emission related warranty obligations are imposed upon the ***certifying*** manufacturer, and not finished goods consumer product manufacturers (like MTD) or retailers such as Lowe's. Just as MTD is not a certifying manufacturer, neither is Lowe's. Your other claims against MTD (i.e., altitude kits, warranty periods, emission warranty claims) are similarly invalid and without merit.

Further, I believe that the Briggs & Stratton will soon readily demonstrate and document that its emission warranty is in compliance with all the requirements of the CAA and that Briggs & Stratton has fulfilled all of its other obligations as the certifying manufacturer.

III. SCCAI Lacks Standing

In your letter, you failed to identify the members of the South Carolina Clean Air Initiative (SCCAI) or explain how they have been somehow harmed—even if all your allegations were valid. It is clear that SCCAI does not have standing because it has not been directly injured by any of the alleged CAA violations.

If you file your complaint against MTD (and/or Lowe's) for violation of the CAA, MTD respectfully plans to immediately file a Motion to Dismiss your complaint for lack of standing. Although Section 304 of the CAA, 42 U.S.C. § 7604(a), allows "any person [to] commence a civil action on his own behalf" for violation of an emission standard or limitation under the CAA, plaintiffs who bring citizens' suits must still demonstrate that they satisfy Article III standing. *See Raines v. Byrd*, 521 U.S. 811, 820 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing"); *LaFleur v. Whitman*, 300 F.3d 256, 269 (2d Cir. 2002) (dismissing a CAA citizens' suit for lack of Article III standing); *Potra v. Jacobson Co*., 2014 WL 1275594 (N.D. Ga. 2014) (dismissing a CAA citizens' suit because the plaintiffs failed to show that they were impacted by the defendants' conduct "in a personal and individual way").

Accordingly, to have standing to bring this action, your client would have to show: (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury is fairly traceable to MTD's challenged conduct; and (3) that it is likely that the alleged injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). It appears there is no basis on which your client will be able to make this showing for any of its claims. In fact, you have not even suggested that your client actually encountered—much less was injured or impacted by—the cited CAA violations. (I'm curious as to how a vague "Initiative" can actually use a lawn mower.)

Your client is not affected whatsoever by the alleged paperwork violations as a "citizen plaintiff," in part, because they do not involve any "excess emissions." A general interest is insufficient to confer Article III standing. *See Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1147 (9th Cir. 2013) (dismissing a CAA citizens' suit because the plaintiffs failed to satisfy *Lujan*'s causality or redressability prongs). "The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Families for Asbestos Compliance Testing & Safety v. City of St. Louis, Mo.*, 638 F. Supp. 2d 1117, 1125 (E.D. Mo. 2009) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 169 (2000)). This very point was emphasized in *Hoewischer v. The Cedar Bend Club, Inc*., 2013 WL 1155783 (M.D. Fla 2013), where, in an ADA serial litigation matter, the Court found that the plaintiff lacked standing to bring suit:

> It hardly needs to be repeated that suits like these "undermine both the spirit and the purpose of the ADA." *Brother*, 331 F.Supp.2d at 1375; see also *Lamb v. Charlotte Cnty*., 429 F.Supp.2d 1302, 1310 (M.D. Fla. 2006) (collecting cases). Yet, this Court feels compelled to note once more that this "cottage industry" has turned the noble mission of the ADA into "an ongoing scheme to bilk attorney's fees" which continues to "cr[y] out for a legislative solution." *Rodriguez*, 305 F.Supp.2d at 1280; *Brother*, 331 F.Supp.2d at 1375. This takes precious judicial resources away from the consideration of those cases in which plaintiffs with actual, concrete injuries lack meaningful access to their schools, jobs, and other local facilities. *See also Brother v. Tiger Partner, LLC* , 331. F. Supp. 2d 1368 (M.D. Fla 2004).

IV. Rule 11 Sanctions

Attorneys must make a reasonable inquiry under the circumstances and may not make factual assertions in a Federal Complaint which you know, or should know, are obviously invalid or specious. Rule 11 is quite clear on this. Federal Rule of Civil Procedure 11 directs district courts to impose sanctions against a litigant who signs frivolous or abusive pleadings. *See Clark v. Mortenson*, 93 F. App'x 643, 650 (5th Cir. 2004); *Petrano v. Old Republic Nat. Title Ins. Co*., No. 13-11984, 2014 WL 5567779, at *2 (11th Cir. Nov. 4, 2014) ("A district court may impose monetary sanctions if a party's filings are frivolous and needlessly increase the cost of litigation"). "Most federal circuit courts agree that a litigant's filing of a frivolous lawsuit for an improper purpose constitutes bad faith and warrants sanction." *Galanis v. Szulik*, 841 F. Supp. 2d 456, 460 (D. Mass. 2011) (citing *Thomas v. Tenneco Packaging Co*., Inc., 293 F.3d 1306, 1320 (11th Cir. 2002); *Lipsig v. Nat'l Student Mktg. Corp*., 663 F.2d 178, 181 (D.C. Cir. 1980); *BDT Prods., Inc. v. Lexmark Intern., Inc*., 602 F.3d 742, 752 (6th Cir. 2010); *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1108 (9th Cir. 2002); *Batson v. Neal Spelce Assocs., Inc*., 805 F.2d 546, 550 (5th Cir. 1986); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980)). The legislative history of the CAA Citizens' suit provisions demonstrates that Congress was concerned that the Citizens' suit provisions should never be used for inappropriate purposes.

V. Attorney Fee Liability

There is recent precedent supporting a substantial award of attorneys' fees in these circumstances. In *Sierra Club v. Energy Future Holdings Corp.*, No. 6:12-cv-00108-WSS, ECF No. 305 (W.D. Tx. Aug. 29, 2014), the court awarded $6.4 million in attorneys' fees in a citizen suit case brought by the Sierra Club, following an award of summary judgment in the case. The Court determined that the Sierra Club claims were frivolous from inception and that plaintiff was informed about the frivolous nature of its allegations prior to filing suit. You have been similarly informed through this letter.

VI. Defamation Exposure

Respectfully, you and your law firm (and the SCCAI and its members) should also be concerned about potential liability if you were ever to make assertions, such as in a press release, or communications to third parties, with false statements that directly harm MTD's reputation with thousands of its dealers, and millions of its commercial and consumers that purchase or service MTD products. Under South Carolina law, defamation involves the publication of a false statement to a third party that results in injury to another, including injury to one's reputation or business. *See Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 465-66 (S.C. 2006). Compensatory damages for defamation are not limited to out-of-pocket expenses ("special damages"); they also include "general damages." *Id*. at 465 n.6. General damages "include injury to reputation … and similar types of injuries which are not capable of definite money valuation." *Id*. *See also Fountain v. First Reliance Bank*, 398 S.C. 434, 442 (S.C. 2012).

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Although I am open to conversation concerning these issues, I believe this letter is self-explanatory and that no further action on your client's behalf is justifiable or warranted as to MTD, Briggs & Stratton or Lowe's.

Sincerely,

William M. Guerry

William M. Guerry
Counsel for MTD Products Inc.

cc: Phil Brooks, EPA-OECA
Evan Belser, EPA-OECA
Marshall Taylor, SC DHEC
Alan Wilson, Esq., SC AG
Patricia Hanz, Briggs & Stratton
Angela Radel, Lowe's
Lawrence Muscarella, MTD Products Inc.
Heather Ross, MTD Products Inc.